89-1150

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BLUE CROSS AND BLUE SHIELD
OF MARYLAND, INC.,

Petitioner,

v.

ROBERT WEINER, SR., MARGARET WEINER, MARK WEINER,
AND ROBERT WEINER, SR. AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF STEVEN WEINER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA

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Attorneys for Petitioner

January 22, 1990

The Daily Record Co., Baltimore, MD 21202

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APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT
JANUARY TERM 1989

BLUE CROSS/BLUE SHIELD OF FLORIDA, INC.,

Appellant,

v.

ROBERT WEINER, MARGARET WEINER, MARK WEINER and ROBERT WEINER as Personal Representative of the Estate of STEVEN WEINER, BLUE CROSS OF MARYLAND, INC., BLUE SHIELD OF MARYLAND, INC., BLUE CROSS AND BLUE SHIELD OF MARYLAND, INC.,

Appellees.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

CASE NOS. 4-86-2899
4-86-2924
4-86-2925
4-86-2926
and 4-86-2927.

Opinion filed April 26, 1989

Consolidated appeals from the Circuit Court for Broward County; Robert L. Andrews, Judge.

Alan C. Sundberg and Sylvia Wabolt
of Carlton, Fields, Ward, Emmanuel,
Smith, Cutler & Kent, P.A., Tampa;
Esler & Kirschbaum, P.A., Fort
Lauderdale; Podhurst, Orseck, Parks,
Josefsberg, Eaton, Meadow & Olin,
Miami; for appellant.

Joan Fowler and G. Bart Billbrough
of Walton Lantaff Schroeder & Carson,
West Palm Beach, for Blue Cross/Blue
Shield of Maryland, Inc., Blue Cross
of Maryland, Inc., and Blue Shield
of Maryland, Inc.

Larry S. Stewart and James B. Tilghman,
Jr., of Stewart Tilghman Fox & Bianchi,
P.A., Miami, for Appellees-Weiner.

STONE, J.

This is a consolidated appeal from a final judgment in favor of the Weiners, the insureds, against Blue Cross and Blue Shield of Florida (Florida) and Blue Cross and Blue Shield of Maryland (Maryland). The jury returned a verdict against both companies on claims of fraud and intentional infliction of emotional distress, and against Maryland on negligence as well.

The claims arose out of a denial of coverage by Maryland. Maryland had issued a group health insurance plan which it sold to individual gasoline service station retailers through an independent marketing company, ASFI, supposedly in cooperation with the national and state service station dealers associations. Maryland retained Florida as its agent to service those accounts in this state. Maryland wrote the policies, and prepared a National Account Enrolled Group Summary (NAEGS), which set out guidelines to be followed by the servicing agents in each state in administering the group policy.

The plaintiff joined Service Station Dealers of America and purchased health insurance coverage for his family

through ASFI, which became effective in March 1982. At that time the policy covered his sons, Mark, age 18, and Steven, age 20, who was enrolled as a full-time student. Tragically, on August 21, 1982, Mark, as a result of an accident, became a quadriplegic. During that same summer, Steven was diagnosed as having a fatal illness and did not return to school. Both required hospitalization and extensive nursing care. In August 1983, a decision was made by Maryland, and communicated to plaintiffs through Florida, that Mark was not covered since the accident occurred after his 19th birthday, and that Steven was not covered because he was no longer a full-time student.

In fact, the benefits book prepared by Maryland provided that children were covered until the end of the calendar year in which they turned 19 and that full-time students were covered until the end of the calendar year in which they turned 23. However, the NAEGS provided that, where a 19 year old, or older, child was incapable of self support due to physical incapacity, that child would remain covered, provided the incapacity occurred prior to the child's 19th birthday.

The Weiners' nursing service terminated home care as to both children when they learned that coverage was no longer available. The plaintiffs' attorney contacted Florida and was told that the question of coverage was Maryland's decision. The attorney was referred to a Maryland executive, who advised him that Maryland had terminated coverage. The result was loss and suffering by the family from the lack of nursing care. Florida did offer, and did furnish, a conversion policy as to Mark, which did not include major medical coverage. It did not advise plaintiffs of their right to a conversion policy for Steven.

In October 1983, the Weiners filed suit, alleging the following counts: I.) fraud as to Maryland; II.) fraud as to Florida for falsely representing to the plaintiffs that they needed to purchase a conversion policy for Mark after his 19th birthday; III.) intentional infliction of mental distress as to

both companies; IV.) negligence as to Maryland; and V.) negligence as to Florida. In March 1984, Maryland agreed to reinstate the coverage. The jury found in favor of Florida on the negligence claim and in favor of plaintiffs on all other counts. The verdict against Maryland was for $500,000 compensatory damages and $5,000,000 punitive damages, and against Florida for $200,000 compensatory and $1,500,000 punitive damages.

With respect to the fraud claim, Florida contends that there was no evidence that the conduct of its employees was anything more than negligent. Florida argues that it was entitled to rely upon what it was told by its principal, Maryland, and by ASFI, as it did not have the contract, even if a copy of the booklet was in Florida's possession. We concur, and conclude that Florida was entitled to a directed verdict on the fraud claim. Recovery for fraud requires proof of intentional and knowing misrepresentation of material fact, designed to cause detrimental reliance. *See First Interstate Development Corp. v. Ablanedo,* 511 So.2d 536 (Fla. 1987); *A.S.J. Drugs, Inc. v. Berkowitz,* 459 So.2d 348 (Fla. 4th DCA 1984). As an agent, Florida relayed the decisions of its principal to plaintiffs and their attorney. There was no proof of any intentional misrepresentation or any actual knowledge by Florida that Mark and Steven remained covered by the Maryland policy.

While the failure of Florida to provide broader benefits in the conversion contract may have been negligent, or a breach of contract, there is no proof of fraud. The evidence reflects that even prior to the accident, ASFI, which had no connection to Florida, had advised plaintiffs of the impending expiration of coverage upon Mark's 19th birthday and directed the insured to contact Florida about conversion to a non-group plan for Mark, and that this advice was subsequently repeated to plaintiffs by ASFI. It is further apparent from the record that once Maryland decided to terminate coverage, Florida had a contractual duty to offer the alternative coverage. Thus, the plaintiffs failed to establish that

Florida knew that any of its representations, either as to the need for a conversion policy or as to coverage under either policy, were false.

With respect to the intentional infliction of emotional distress claim against Florida, we also reverse. In *Metropolitan Life Insurance Co. v. McCarson,* 467 So.2d 277 (Fla. 1985), the supreme court applied these comments given in the *Restatement (Second) of Torts,* §46 (1965):

> d. Extreme and outrageous conduct
>
> . . . It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"
>
> . . . .
>
> g. The conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.

There, Metropolitan Life issued a group insurance policy to McCarson, which covered employees of his shop, including his wife. Mrs. McCarson became incapacitated the next year with Alzheimer's disease, and the insurer stopped payment of her benefits, claiming her condition was preexisting. McCarson filed suit and Metropolitan Life was found in

breach of contract and ordered to provide coverage. Mrs. McCarson later needed continual nursing care, for which Metropolitan was responsible until the policy lapsed or she became eligible for Medicare. The insurer requested proof of ineligibility for Medicare, and discontinued payment of benefits when it received no response. Looking at the facts in the light most favorable to the plaintiff, the supreme court ruled that they were not, as a matter of law, " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.' " *McCarson* at 279.

Here, there was no evidence that Florida had the authority to make independent coverage decisions with respect to Maryland's policy, and it initially double checked the coverage question with Maryland. In any event, it is undisputed that, when questioned about the coverage issue, Florida referred plaintiffs' counsel to Maryland, and that all further discussions were between them. The proof simply failed to reach the heavy burden required for recovery on this tort. *See Metropolitan Life Insurance Co. v. McCarson; Swinarski v. Keller,* 529 So.2d 1208 (Fla. 4th DCA 1988); *Davis v. Gulf Life Insurance Co.,* 502 So.2d 1012 (Fla. 3d DCA 1987). *See also Campbell v. Prudential Insurance Co.,* 480 So.2d 666 (Fla. 5th DCA 1985). *Cf. Dominguez v. Equitable Life Assurance Society of the United States,* 438 So.2d 58 (Fla. 3d DCA 1983).

Therefore as to Florida, we conclude that the trial court erred in denying Florida's motion for directed verdict as to the plaintiffs' claims for fraud and intentional infliction of emotional distress, and reverse.

With respect to Maryland, we first find no error in the instruction to the jury that ASFI was an agent of Maryland in connection with the group health plan. Ordinarily the existence of an agency relationship is a question of fact. *Orlando Executive Park, Inc. v. Robbins,* 433 So.2d 491 (Fla. 1983); *Folwell v. Bernard,* 477 So.2d 1060 (Fla. 2d DCA 1985), *rev. denied,* 486 So.2d 595 (Fla. 1986). However, here the relationship between Maryland and ASFI, in the devel-

opment of and the national marketing of the group plan, in distributing Maryland's benefit book, and in other acts pursuant to the agreement between them, is susceptible of only one interpretation. *See Jaar v. University of Miami,* 474 So.2d 239 (Fla. 3d DCA 1985), *rev. denied,* 484 So.2d 10 (Fla. 1986). Therefore, the trial court did not err in concluding as a matter of law that ASFI was acting on Maryland's behalf.

As to Maryland, we are satisfied that there was sufficient evidence in the record, when considering inferences that may be drawn from the proofs, to submit the issue of fraud to the jury. *See U.S. Home Corporation, Rutenberg Homes Division v. Metropolitan Property and Liability Insurance Co.,* 516 So.2d 3 (Fla. 2d DCA 1987); *Needle v. Lowenberg,* 421 So.2d 678 (Fla. 4th DCA 1982), *rev. denied,* 427 So.2d 737 (Fla. 1983); *Nantell v. Lim-Wick Construction Co.,* 228 So.2d 634 (Fla. 4th DCA 1969). *Cf. Sun Life Assurance Company of Canada v. Land Concepts, Inc.,* 435 So.2d 862 (Fla. 4th DCA 1983); *First National Bank of Stuart v. Jackson,* 267 So.2d 697 (Fla. 4th DCA 1972). We also find no error in submitting the issue of punitive damages to the jury. *First Interstate Development Corp. v. Ablenado,* 511 So.2d 536 (Fla. 1987); *Rappaport v. Jimmy Bryan Toyota of Fort Lauderdale, Inc.,* 522 So.2d 1005 (Fla. 4th DCA 1988); *Ruding v. Thompson,* 517 So.2d 706 (Fla. 4th DCA 1987)

The appellees argue that Maryland's motion for directed verdict on the punitive damage issue did not question the sufficiency of proof on the fraud and emotional distress claims. However, we need not examine this point, nor whether the evidence supports the jury's findings that Maryland's actions amounted to an intentional infliction of emotional distress. The verdict form used here does not contain separate findings for damages for each count pled. As the verdict may be sustained on any one of the theories submitted to the jury, reversal is improper where no error is found as to one of those theories. *See Colonial Stores, Inc. v. Scarbrough,* 355 So.2d 1181 (Fla. 1978); *Florida Patient's Compensation Fund v. Sitomer,* 524 So.2d 671 (Fla. 4th DCA

1988); *Howell v. Woods*, 489 So.2d 154 (Fla. 4th DCA 1986); *Getelman v. Leve* , 481 So.2d 1236 (Fla. 3d DCA 1985).

Maryland's principal assertion on appeal is that there is a lack of jurisdiction over the subject matter because the plaintiff's claim is preempted by the Employee Retirment Income Security Act of 1974, 29 U.S.C. §1001-1461, ("ERISA"), and that state courts do not have concurrent jurisdiction. *See also Pilot Life Insurance Co. v. Dedeau*, 481 U.S. 41, 107 S.Ct. 1549, 95 L. Ed. 2d 39 (1987). However, we find that ERISA does not apply to this policy.

ERISA regulates employee benefit plans, including ones providing for medical and hospital care, if the plan is established or maintained by an employer or employee organization, or both. ERISA §4(a), 29 U.S.C. §1003(a). Here, the record does not support a conclusion that there was an employee plan. The record does not reveal any agreement between the service station dealers associations and Maryland or AFSI. The evidence, although disputed, reflects that the plaintiff here was a sole proprietor who simply purchased a group policy for his family. *See Xaros v. U.S. Fidelity and Guaranty Co.*, 820 F. 2d 1176 (11th Cir. 1987); *Donovan v. Dillingham*, 688 F. 2d 1367 (11th Cir. 1982); *Taggart Corp. v. Life and Health Benefits Administration, Inc.*, 617 F. 2d 1208 (5th Cir. 1980). Here there was no plan, or even an informal agreement, established or maintained by an employer or an employee organization. Nor were any fiduciary responsibilities created by this insurance marketing scheme, which simply made group insurance available to members of the organization.

Maryland contends that attorney's fees were improperly taxed under section 627.428, Florida Statutes. However, it appears that this action involved additional issues other than those presented on appeal regarding the plaintiffs' tort claims. The trial court found that matters of coverage and interpretation of the policy were the "central core" of the trial. The trial court acknowledged that the sums sought and amount of hours appeared large, but were in part neces-

sitated by obstructionist tactics. Generally claimants are not entitled to attorney's fees under section 627.428 in a tort action. *E.g., United General Life Insurance Co. v. Koske,* 519 So.2d 71 (Fla. 5th DCA 1988); *United Services Automobile Association v. Kiibler,* 364 So.2d 57 (Fla. 3d DCA 1978). However, the trial court determined that this award was founded on the hours utilized in resolving coverage. Nor has Maryland shown that the amount of the fee was clearly excessive. *See Good Samaritan Hospital Ass'n v. Saylor,* 495 So.2d 782 (Fla. 4th DCA 1986). *See also State Farm Fire & Casualty Co. v. Palma,* 524 So.2d 1035 (Fla. 4th DCA 1988).

As we are reversing the judgment against Florida, the award of attorney's fees in favor of the insured must be reversed as to Florida. We therefore reverse the judgment of attorney's fees and remand in order that they may be reapportioned as to Maryland alone.

We find the other issues raised by Maryland also to be without merit. Therefore, the final judgment is affirmed as to Maryland and reversed as to Florida. We remand so that an amended judgment against Maryland may be entered accordingly.

DOWNEY and LETTS, JJ., concur.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FOURTH DISTRICT,
P.O. BOX A, WEST PALM BEACH, FL 33402

BLUE CROSS/BLUE SHIELD
OF FLORIDA, INC.,

Appellant(s),

v.

ROBERT WEINER,
MARGARET WEINER, et al.,

Appellee(s).

CASE NO. 4-86-2899, 4-86-2924
4-86-2925, 4-86-2926
and 4-86-2927.

JUNE 19, 1989

BY ORDER OF THE COURT:

ORDERED that the May 11, 1989 Motion for Rehearing and Rehearing *en banc*, filed by Blue Cross of Maryland, Inc., is hereby denied.

I hereby certify that the foregoing is a
true copy of the original court order.

/s/

CLYDE L. HEATH,
CLERK.

cc: G. Bart Billbrough
Larry S. Stewart
Joel L. Kirschbaum
Bob Josephsberg
Alan C. Sundberg–

cms

APPENDIX C

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 84-00840 CH

ROBERT WEINER, MARGARET WEINER,
MARK WEINER, and ROBERT WEINER
as Personal Representative of
the Estate of STEVEN WEINER,

Plaintiffs,

vs.

BLUE CROSS OF MARYLAND, INC.,
BLUE SHIELD OF MARYLAND, INC.,
BLUE CROSS and BLUE SHIELD OF
MARYLAND, INC. and BLUE CROSS/
BLUE SHIELD OF FLORIDA, INC.,

Defendants

FINAL JUDGMENT

THIS CAUSE came on to be heard before the Honorable Robert L. Andrews, one of the Judges of the above-styled Court, and a jury of six true and lawful men and women, who, having been first duly sworn according to law, and having heard the evidence, the arguments of counsel and the charges of the Court, and having retired to consider their verdict, returned in open Court the following verdict, to-wit:

We, the jury, return the following verdict:

1. Did Blue Cross/Blue Shield of Maryland misrepresent the coverage available under its group health plan for Mark or Steven Weiner, which was a legal

cause of injury to the plaintiffs?

YES X NO ___

2. Did Blue Cross/Blue Shield of Florida misrepresent the need for or terms of continuing coverage for Mark Weiner, which was a legal cause of injury to the plaintiffs?

YES X NO ___

3. Were there intentional or reckless actions of either Blue Cross/Blue Shield of Maryland or Blue Cross/Blue Shield of Florida that caused severe emotional distress to the plaintiffs?

As to Blue Cross/Blue Shield of Maryland:
YES X NO ___

As to Blue Cross/Blue Shield of Florida:
YES X NO ___

4. Was there negligence on the part of either Blue Cross/Blue Shield of Maryland or Blue Cross/ Blue Shield of Florida in the administration of the group health plan which was a legal cause of damage to the plaintiffs?

As to Blue Cross/Blue Shield of Maryland:
YES X NO ___

As to Blue Cross/Blue Shield of Florida:
YES ___ NO X

[If you have answered NO to questions l, 2, 3 and 4, your verdict is for the defendants and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If., however, your answer to any part of any one or more of questions 1, 2, 3 or 4 is YES, you should proceed to answer question 5.

5. What is the total amount (100%) of the injury or damages sustained by each of the plaintiffs by virtue

of the defendant and/or defendants' acts?

	As to Blue Cross/Blue Shield of Maryland	As to Blue Cross/Blue Shield of Florida
Robert Weiner	$100,000.00	$50,000.00
Margaret Weiner	$100,000.00	$50,000.00
Mark Weiner	$150,000.00	$50,000.00
Estate of Steven Weiner	$150,000.00	$50,000.00

[If your answer to any part of any one or more of questions 1, 2 or 3 is YES, you should also proceed to answer question 6.]

6. As punitive damages against the defendants, the jury assesses the following sums:

Blue Cross/Blue Shield of Maryland	$5,000,000.00
Blue Cross/Blue Shield of Florida	$1,500,000.00

SO SAY WE ALL this 25th day of September, 1986.

/s/ Willie Woods
Foreperson

it is therefore

ORDERED AND ADJUDGED that Final Judgment be and it it [sic] hereby entered in this cause in favor of the plaintiffs and against the defendants, and the plaintiff, Robert Weiner, shall have and recover from the defendant, Blue Cross/Blue Shield of Maryland, the sum of One Hundred Thousand Dollars ($100,000.00) and from the defendant, Blue Cross/Blue Shield of Florida, the sum of Fifty Thousand Dollars ($50,000.00), lawful money of the United States of America; the plaintiff, Margaret Weiner, shall have and recover from the defendant, Blue Cross/Blue Shield of Maryland, the sum of One Hundred Thousand Dollars

($100,000.00) and from the defendant, Blue Cross/Blue Shield of Florida, the sum of Fifty Thousand Dollars ($50,000.00), lawful money of the United States of America; the plaintiff, Mark Weiner, shall have and recover from the defendant, Blue Cross/Blue Shield of Maryland, the sum of One Hundred Fifty Thousand Dollars ($150,000.00) and from the defendant, Blue Cross/Blue Shield of Florida, the sum of Fifty Thousand Dollars ($50,000.00), lawful money of the United States of America; the plaintiff, the Estate of Steven Weiner, shall have and recover from the defendant, Blue Cross/Blue Shield of Maryland, the sum of One Hundred Fifty Thousand Dollars ($150,000.00) and from the defendant, Blue Cross/Blue Shield of Florida, the sum of Fifty Thousand Dollars ($50,000.00), lawful money of the United States of America; and the plaintiffs shall recover as punitive damages from the defendant, Blue Cross/Blue Shield of Maryland, the sum of Five Million Dollars ($5,000,000.00) and as punitive damages from the defendant, Blue Cross/Blue Shield of Florida, the sum of One Million, Five Hundred Thousand Dollars ($1,500,000.00), lawful money of the United States of America; and FOR WHICH LET EXECUTION ISSUE.

IT IS FURTHER ORDERED AND ADJUDGED that the Court shall retain jurisdiction of this cause and the parties thereto for determination of the question of taxation of costs and attorneys fees.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 26th day of September, 1986.

/s/

CIRCUIT COURT JUDGE

Copies furnished to:
Stewart Tilghman Fox & Bianchi, P.A.
Esler & Kirschbaum
Walton Lantaff Schroeder & Carson
Podhurst Orseck Parks Josefsberg
Eaton Meadow & Olin

APPENDIX D

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 84-00840 CH

ROBERT WEINER, MARGARET WEINER,
MARK WEINER, and ROBERT WEINER
as Personal Representative of
the Estate of STEVEN WEINER,

Plaintiffs,

vs.

BLUE CROSS OF MARYLAND, INC.,
BLUE SHIELD OF MARYLAND, INC.,
BLUE CROSS and BLUE SHIELD OF
MARYLAND, INC. and BLUE CROSS/
BLUE SHIELD OF FLORIDA, INC.,

Defendants.

ORDER ON PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND JUDGMENT THEREON

THIS CAUSE coming on before the Court on November 20, 1986, on the Plaintiffs' Motion for Attorneys Fees and the Court having conducted a hearing and considered the testimony and evidence presented at such hearing, and the Court being fully advised in the premises, hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Court finds that the matters of coverage, interpretation of the insurance policies involved and the policy claims of the defendants were the mainstay of contention

and the central core of the trial of this case and of much of the discovery and pretrial proceedings that preceded the trial. The Court has carefully examined the time itemizations submitted on behalf of plaintiffs' counsel and has specifically excluded time involved in travel as well as time that the Court has found to be duplicative. The Court has also specifically excluded over 500 hours of paralegal time in accordance with the holding in *Rivers Trailers, Inc. v. Miller,* 489 So.2d 1139 (Fla. lst DCA 1986).

Taking all of the foregoing into account, the Court finds that the reasonable amount of hours expended by plaintiffs' counsel in this case with respect to the matters of coverage, interpretation of the insurance policies involved and the policy claims of the defendants is as follows:

Colson, Hicks & Ridson	158.5
Larry S. Stewart	800.0
David W. Bianchi	900.0

In arriving at these figures, the Court has considered the fact that the insurance benefits resulting to the plaintiffs by reason of this action, may well exceed several million dollars. At the time that the defendants began to process plaintiffs bills in March, 1984, there was outstanding approximately $150,000 in unpaid medical bills. During the progress of the litigation, the defendants asserted that the entire coverage was void by reason of plaintiffs' misrepresentation and that alternatively certain services were not covered benefits. The insurance coverage consists of three policies: physician services coverage in an unlimited amount, hospital services coverage in an unlimited amount and major medical coverage with a primary limit of $1,000,000 per person. The plaintiff, Mark Weiner, is a quadriplegic and will undoubtedly require medical care in excess of $1,000,000. The plaintiffs, Robert and Margaret Weiner, have in the past and most probably will in the future require medical care.

The Court also notes that while these amounts of time in the abstract appear large, the Court finds that a great deal

of this time was necessitated by the defendants' conduct in pursuing obstructionist discovery tactics, asserting non-meritorious policy positions and a non-meritorious affirmative defense all of which resulted in extensive discovery which would otherwise have been unnecessary. Consistent with the purpose of Chapter 627.428, Florida Statutes, to discourage contesting of insurance matters, the Court finds that all of such time expended by plaintiffs' counsel in dealing with those matters should be included in arriving at a reasonable fee. The Court also notes with respect to the reasonableness of the time involved by plaintiffs' counsel, that the defense attorneys in this case cumulatively spent in excess of 2800 hours. Although that time included all issues, it strongly buttresses the reasonableness of plaintiffs' counsels' time on the insurance issues.

2. In arriving at a reasonable hourly rate, the Court has taken into account the skill and expertise of the counsel involved as well as the testimony of the expert witnesses. The Court finds that a reasonable hourly rate for Larry S. Stewart is $350 per hour; that a reasonable hourly rate for David W. Bianchi is $200 per hour; and that a reasonable hourly rate for the time of the firm of Colson, Hicks & Ridson, which consists primarily of the services of Dean Colson, is $200 per hour.

3. Based on the foregoing the Court determines that the lodestar for Larry S. Stewart is Two hundred eighty thousand Dollars ($280,000.00); that the lodestar for David W. Bianchi is One hundred eighty thousand Dollars ($180,000.00); and that the lodestar for Colson, Hicks & Ridson is Thirty-one thousand, six hundred Dollars ($31,600.00).

4. In consideration of the expert witness testimony and the Court's own personal observation of the trial of this cause, the Court finds that there should be an upward enhancement based upon the "contingency risk factor" delineated in *Florida Patients Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985). Based on the Court's observa-

tions of the file, pretrial hearings and the trial itself, the Court finds that the likelihood of success at the time the case was initiated was unlikely. From the very outset, up to the trial itself, the defendants took the position of stonewalling, of delaying and going into collateral matters to divert the search for the truth. In the hands of lesser counsel there would in all probability have been no success at all. The unlikelihood of success is also borne out in part by the fact that Blue Cross/Blue Shield of Maryland never made any offer of settlement and Blue Cross/Blue Shield of Florida stated it would consider only a minimal offer of settlement before trial. Based on the foregoing, the Court finds that as to the services performed by Larry S. Stewart and David W. Bianchi, the lodestar should be enhanced by a multiplier of 3.0. As to the services of Colson, Hicks & Ridson, the Court does not find a multiplier to be applicable.

5. Multiplying the lodestar figure for the services of Larry S. Stewart and David W. Bianchi by 3.0 and including the lodestar for Colson, Hicks & Ridson, the Court determines the reasonable attorneys' fee in this case to be One Million, Four Hundred Eleven Thousand, Six Hundred Dollars ($1,411,600.00).

CONCLUSIONS OF LAW

Based upon the foregoing, it is hereby

ORDERED AND ADJUDGED that the Plaintiffs [sic] Motion for Attorneys Fees be and the same hereby is granted and attorneys fees are hereby awarded to the plaintiffs in the sum of One Million, Four Hundred Eleven Thousand, Six Hundred Dollars ($1,411,600.00).

JUDGMENT ON ATTORNEYS FEES

It is hereby ORDERED AND ADJUDGED that a judgment of attorneys fees be entered in favor of the Plaintiffs, Robert Weiner, Margaret Weiner, Mark Weiner, and Robert Weiner as Personal Representative of the Estate of Steven Weiner, and against the Defendants, Blue Cross of Mary-

land, Inc., Blue Shield of Maryland, Inc., Blue Cross and Blue Shield of Maryland, Inc. and Blue Cross/Blue Shield of Florida, Inc., and the Plaintiffs shall have and recover as attorneys fees from said Defendants the sum of One Million, Four Hundred Eleven Thousand, Six Hundred Dollars ($1,411,600.00), lawful money of the United States of America, and for which let execution issue.

DONE AND ORDERED in Chambers Fort Lauderdale, Broward County, Florida this 24th day of November, 1986.

/s/

CIRCUIT COURT JUDGE

Copies furnished to:

Mr. Carl E. Jenkins
WALTON LANTAFF SCHROEDER & CARSON
Robert C. Josefsberg
PODHURST ORSECK PARKS JOSEFSBERG
EATON MEADOW & OLIN, P.A.
Joel L. Kirschbaum
ESLER & KIRSCHBAUM, P.A.
Larry S. Stewart
STEWART TILGHMAN FOX & BIANCHI, P.A.

APPENDIX E

IN THE CIRCUIT COURT OF
THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY,
FLORIDA

GENERAL JURISDICTION
DIVISION

CASE NO.: 84-00840 CH

ROBERT WEINER, MARGARET WEINER,
MARK WEINER, and ROBERT WEINER
as personal representative of
the estate of STEVEN WEINER,

Plaintiffs,

vs.

BLUE CROSS OF MARYLAND, INC.,
BLUE SHIELD OF MARYLAND, INC.,
BLUE CROSS and BLUE SHIELD OF
MARYLAND, INC.

Defendants.

ORDER ON PLAINTIFFS' MOTION FOR ATTORNEYS FEES BY REMAND FROM THE 4TH DISTRICT COURT OF APPEAL

THIS CAUSE is before the Court on remand from the 4th District Court of Appeal, following an appeal by the Defendants, regarding an award of attorney fees in favor of the Plaintiff. In that appeal, the Court reversed the judgement of attorney fees against Florida, and remanded so that this Court may reapportion attorney fees as to Maryland alone.

FINDINGS OF FACT

The facts of this case are as follows. In March of 1982, Mr. Weiner purchased health insurance for himself and his family. That policy was sponsored by Blue Cross/Blue Shield of Maryland (Maryland). Blue Cross/Blue Shield of Florida (Florida) was at all times Maryland's agent for the purpose of servicing claims arising in this state.[1] Tragically, in August [19]82, Mark Weiner was involved in an accident and became a quadriplegic. That same summer Steven Weiner was diagnosed with a fatal illness. As the insurance coverage called for, Maryland began making payments for hospitalization and nursing care. In August of 1983, Mr. Weiner was informed that all coverage was being terminated. When negotiations to reinstate coverage proved fruitless, a suit was instituted in which Mr. Weiner prevailed against both Defendants. This Court, on plaintiff's motion, then awarded the Weiners attorney's fees as called for by Florida Statute 627.428.[2] Florida appealed to the 4th District Court of Appeal which reversed both the judgment and the award of attorney's fees as to Florida but affirmed the judgment as to Maryland. It is now this Court's responsibility to consider the issue of reapportionment of the award of attorney's fees as to Maryland alone.

The issues surrounding attorney fees have seen ample exposure in this State. It is well settled in Florida that attorney's fees may only be awarded by contract, when an attor-

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[1] The 4th District Court of Appeal itself expressly noted that Florida was Maryland's agent.

[2] Florida Statute 627.428 Attorney's Fees

(1) Upon the rendition of a judgment of decree by any of the courts of this state against an insured and in favor of any named or omnibus insured . . . the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which recovery is had.

ney creates or brings a special fund into the court, or as in this case, by statute. *McElhiney v. Ash Properties, Inc.*, 411 So.2d 291 (Fla. lst Dist. Ct. App. 1982), *City of Miami Beach v. Town of Bay Harbor Islands*, 380 So.2d 1112 (Fla. 3rd Dist. Ct. App. 1980). The remedy stated in Florida Statute 627.428 has existed in some form or another for many years. The aim of this statute, and the underlying public policy is to dissuade insurers from contesting insurance coverage, especially when the insureds, such as the plaintiffs, are in such dire straits. *Feller v. Equitable Life Assurance Soc.*, 57 So.2d 581,586 (Fla. 1952) (en banc), *Florida Rock and Tank Lines, Inc. v. Continental Insurance Co.*, 399 So.2d 122,124 (Fla. lst Dist. Ct. App. 1981). In cases such as these, the statutory provisions awarding attorney's fees is in the nature of a penalty, and must be strictly construed by the court. *Wilmington Trust Co. v. Manufacturers Life Insurance*, 749 F.2d 694, 700 (11th Cir. 1985), *Travelers Indemnity Co. v. Chisholm*, 384 So.2d 1360 (Fla. 2d Dist. Ct. App. 1980), *American National Insurance Co. v. de Cardenas*, 181 So.2d 359, 361 (Fla. 3rd Dist. Ct. App. 1965).

It is Maryland's position that time expended by Plaintiff's attorneys in relation to Florida should not be assessed against them. To support this position Maryland cites *Vulcan Socieity [sic] of Westchester Cty. v. Fire Department*, 533 F. Supp. 1054 (S.D.N.Y. 1982). That case states that when certain aspects of litigation are attributable solely to one or more defendants, that fairness requires those matters to be identified, and divided among *only responsible* defendants. *Id at 1064*. What the Defendants overlook is that they and not Florida were solely responsible for the Plaintiff's insurance coverage being canceled. It was for this exact reason that the Court of Appeal reversed the judgement as to Florida. It is also for this reason that attorney fees accumulated by the plaintiffs concerning their insurance coverage should be paid by Maryland.

Strictly construing the language of Florida Statute 627.428 gives guidance to the Court in awarding a prevail-

ing insured attorney's fees in a suit involving coverage issues. The statute does not call for apportionment of attorneys fees between two insurers who caused a suit regarding coverage to be instituted. The Statute does however impliedly call for the apportionment of attorneys fees when there are other claims in a suit besides the interpretation of the policy and the determination of coverage, but that is not the case here. In this case, the issues involved fall squarely within the scope and public policy of Florida Statute 627.428.

Maryland also cites *Nash v. Chandler,* 848 F.2d 567 (5th Cir. 1988) for the proposition that fees expended for unsuccessful claims should be segregated from the fee award against Maryland. However, the Court in *Nash* ultimately found that "[t]he unsuccessful claims were not so distinct from the successful claims as to be severed for the purpose of awarding attorney fees". *Id at 572.* In the present case, the claims presented against both Defendants were identical, and all arose from the insurance coverage sponsored by Maryland. Had the claims against the Defendants been separate and distinct then the fee award would properly be divided among those claims, but this is not the case.

Both the Trial Court and Court of Appeal held that matters of coverage and interpretation of the insurance policy were the "central core" of the trial. The United States Supreme Court with reference to a civil rights case has held that:

> [i]n some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants . . . counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been "expended in pursuit of the ultimate result achieved" . . . It may well be that cases involving such unrelated claims are unlikely to arise with great frequency. . . . In other cases the plaintiff's claims for

> relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."

Hensley v. Eckerhart, 103 S.Ct. 1933, 1940, 461 U.S. 424, 435 (1983).

The theories above are aptly summarized in *Chrysler Corp. v. Weinstein,* 522 So.2d 895 (Fla. 3rd Dist. Ct. App. 1988). That case as in the instant one had two defendants and one plaintiff. In *Weinstein* the Appellate Court states "[W]hen claims arose from the same common core of facts the apportionment between claims is not necessary". The Court in *Weinstein* felt that if separate and distinct causes of actions are present rather than alternative theories of liability, apportionment would be appropriate. In this case, every cause of action raised against Maryland was properly raised against Florida. This was due to the tactics of the Defendants in both the initial discovery and pretrial proceedings.[3] It was not until after formal proceedings began that this Court could have concluded that Florida was merely acting as an agent for the benefit of Maryland. It is for reasons such as these that the judgment of attorney fees should be assessed against Maryland alone.

The other cases cited by Maryland are also inapplicable since they involve apportionment between several defen-

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[3] The tactics used by Maryland and Florida resulted in liability for the infliction of emotional distress. Florida was relieved from liability by the 4th District Court of Appeal because the Court found that as an agent, Florida only relayed the decisions of its principle (Maryland). The judgement against Maryland along with liability for fraud is now final.

dants and isolated causes of action not all of which allow the prevailing party attorneys fees.

It is Maryland's contention that this court reconsider the entire issue of attorney's fees as if the previous proceedings never occurred. This view however is inconsistent with Florida case law, and would serve only to further tax an already overworked judicial system. This Court has already conducted hearings, considered testimony, and examined evidence concerning the award of attorneys fees, as required by *Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145 (Fla. 1985). This Court has also considered those factors set forth in *Rowe* and in its discretion, found that the circumstances made the $1,411,600.00 assessment of attorneys fees reasonable. In addition, the amount of the assessment was not found to be unreasonable, and has been upheld.

CONCLUSIONS OF LAW

For the reasoning demonstrated above the Plaintiffs Motion for Attorneys Fees is hereby granted against Maryland alone.

JUDGEMENT ON ATTORNEY FEES

It is hereby ORDERED AND ADJUDGED that a judgement of attorneys fees be entered in favor of the Plaintiffs Robert Weiner, Margaret Weiner, Mark Weiner, and Robert Weiner as Personal Representative of the Estate of Steven Weiner, against BLUE CROSS OF MARYLAND, INC., BLUE SHIELD OF MARYLAND, INC., BLUE CROSS and BLUE SHIELD OF MARYLAND, INC., and the Plaintiffs shall have and recover as attorneys fees from said Defendant the sum of One Million, Four Hundred Eleven Thousand, and Six Hundred Dollars ($1,411,600.00), lawful money of the United States of America, and for which let execution issue.

DONE AND ORDERED in Chambers Fort Lauderdale, Broward County, Florida this 31st day of July 1989.

/s/
CIRCUIT COURT JUDGE

Copies Furnished to:

Larry S. Stewart
STEWART TILGHMAN FOX & BIANCHI, P.A.
G. Bart Billbrough
WALTON LANTAFF SCHRODER & CARLSON
Joel L. Kirschenbaum
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Robert C. Josefsberg
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Alan C. Sundberg and Sylvia H. Walbolt
CARLTON, FIELDS, WARD, EMMANUEL,
SMITH, CUTLER & KENT, P.A.

APPENDIX F

SUPREME COURT OF FLORIDA

Tuesday, October 24, 1989

BLUE CROSS OF MARYLAND, INC., ET AL.,

Petitioners,

v.

ROBERT L. WEINER, ET AL.,

Respondents.

CASE NO.: 74,460

District Court of Appeal,

Fourth District No. 4-86-2899,
4-86-2924, 4-86-2925
4-86-2926, 4-86-2927

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. p. 9.330(d).

OVERTON, Acting C.J.,
SEAW, GRIMES and KOGAN, JJ. concur
McDONALD, J., dissents

A True Copy

TEST: (seal)
Sid J. White /s/
Clerk Supreme Court

cc: Hon. Clyde L. Heath, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. Robert L. Andrews, Judge

G. Bart Billbrough, Esquire
Larry S. Stewart, Esquire
James B. Tilghman, Jr., Esq

APPENDIX G

Pursuant to Rule 28.1, following are the corporate affiliates of Blue Cross and Blue Shield of Maryland, Inc.:

Blue Cross and Blue Shield of Maryland
Finance Company, Inc.
Employers Compliance Services, Inc.
Sterling Health Services, Inc.
Maryland Medical Services, Inc.
DBG Holdings, Inc.
Community Health Services, Inc.
Free State Health Plan, Inc.
Healthline, Inc.
PerTek, Inc.
Benefit Services International, Inc.
Free State Management, Inc.
LifeCard, Inc.
Columbia Medical Plan, Inc.
Health Management Corporation, Inc.
Willse and Associates, Inc.
Columbia Free State Management, Inc.
Twin Knolls Pharmacy, Inc.
Patuxent Medical Group, Inc.
Columbia Dental Plan, Inc.
Patuxent Surgicare, Inc.
Greenspring Mental Health Services, Inc.
Judgment Process Company, Inc.
Columbia Optical Management, Inc.